The Government of Malaysia (JKR Sarawak) v Lau Tiong Ik Construction Sdn Bhd

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO 24-263-2000-II
ZAKARIA SAM JC
16 MARCH 2001

Arbitration *— Arbitrator — Reference of question of law to court — When can it be made — Whether plaintiff has a legal right to refer questions of law to court — Whether it was proper for plaintiff being an interested party to refer questions of law themselves on behalf of the arbitrator — Arbitration Act 1952 s 22*

The plaintiff filed, by way of originating summons, an application under ss 22 and 23 of the Arbitration Act 1952 ('the Act') for orders that the court determines the question of law as stated by the plaintiff, that certain matters contained in the arbitrator's fourth order for directions be stayed until the final determination of the case and that the costs of the application be borne by the plaintiff. The defendant raised two preliminary objections to the plaintiff's application, namely, that the plaintiff's application failed to comply with the requirement of O 69 of the Rules of the High Court 1980 ('the RHC') and that it also failed to comply with the requirements of ss 22 and 23 of the Act.

Held, dismissing the originating summons:

(1) Having read s 22(1) of the Act, the court is of the opinion that reference of question of law to the High Court could only be done in three ways: by the arbitrator on its own volition; or by the arbitrator on the application of any party where the arbitrator may or may not entertain such request; or if the arbitrator decides not to allow such application, any party may apply to the High Court by way of originating summons under O 69 r 3(2) of the RHC to get a court order to direct the arbitrator to state the question of law in the form of a special case for the decision of the High Court which order the arbitrator must comply. It is clear, therefore, that the plaintiff themselves have no legal right to refer any question of law for the decision of the High Court. Only the arbitrator has the right to do so and that this right could not be delegated to any of the parties to the dispute. Any such delegation of function is, therefore, contrary to the provisions of s 22 of the Act (see pp 633G–634A).

(2) It was also not proper for the plaintiff, being an interested party in this matter, to refer the question of law themselves on behalf of the arbitrator. The reference should be made by an independent person, ie the arbitrator. Furthermore, being an interested party there is no guarantee that the plaintiff would only refer the question of law allowed by the arbitrator, as happened in this matter. Here, the defendant complained that the plaintiff had

referred additional questions of law which were never raised before the arbitrator. The complaint is valid. A point not raised before the arbitrator, the party is not entitled to raise it before the court (see p 634A–B).

(3) It is the duty of the arbitrator to sift through the case, identify the facts and then frame the question of law that is to be referred to court. It is not the duty or function of this court to go through the voluminous records and documents of the case to determine the facts and the law that is to be decided. This court could not usurp the role and function of an arbitrator (see p 635B).

(4) An arbitrator is appointed to decide on issues both of facts and law. It is a well-settled principle that not all questions of law should be referred to court for decision. A dispute should be heard by a court only if the point of law involved is substantial and complex and not merely on the ground that it may come back to the High Court by way of case stated (see p 635D).

[**Bahasa Malaysia summary**

Plaintif telah memfailkan, melalui saman pemula, satu permohonan di bawah ss 22 dan 23 Akta Timbangtara 1952 (Akta tersebut') untuk perintah-perintah agar mahkamah menentukan persoalan undang-undang sebagaimana yang dinyatakan oleh plaintif, bahawa perkara-perkara tertentu yang terkandung di dalan perintah arahan penimbangtara yang keempat digantungkan sehingga penentuan muktamad kes tersebut dan bahawa kos permohonan ditanggung oleh plaintif. Defendan telah menimbulkan dua bantahan awal terhadap permohonan plaintif tersebut, terutamanya, bahawa permohonan plaintif telah gagal untuk mematuhi keperluan A 69 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT tersebut') dan bahawa ia juga telah gagal untuk memetuhi keperluan ss 22 dan 23 Akta tersebut.

Diputuskan, menolak saman pemula tersebut:

(1) Setelah membaca s 22(1) Akta tersebut, mahkamah berpendapat bahawa rujukan mengenai persoalan undang-undang kepada Mahkamah Tinggi hanya boleh dilakukan dengan tiga cara: melalui penimbangtara dengan kerelaan beliau; atau melalui penimbangtara atas permohonan mana-mana pihak di mana penimbangtara boleh atau tidak boleh melayan permohonan sedemikian; atau jika penimbangtara memutuskan untuk tidak membenarkan permohonan tersebut, mana-mana pihak boleh memohon kepada Mahkamah Tinggi melalui saman pemula di bawah A 69 k 3(2) KMT tersebut untuk mendapatkan mahkamah mengarahkan penimbangtara untuk menyatakan persoalan undang-undang tersebut di dalam bentuk satu kes khas untuk keputusan Mahkamah Tinggi di mana perintah penimbangtara mesti dipatuhi. Adalah jelas, oleh demikian,

bahawa plaintif sendiri tidak mempunyai apa-apa hak undang-undang yang sah untuk merujuk apa-apa persoalan undang-undang untuk keputusan Mahkamah Tinggi. Hanya penimbangtara mempunyai hak untuk berbuat demikian dan hak tersebut tidak boleh diagihkan kepada mana-mana pihka di dalam pertikaaian tersebut. Apa-apa pengadihan fungsi adalah, oleh demikian, bertentangan dengan peruntukan s 22 Akta tersebut (lihat ms 633G–634A).

(2) Adalah juga tidak betul untuk plaintif, sebagai satu pihak yang mempunyai kepentingan di dalam perkara ini, merujuk persoalan undang-undang mereka bagi pihak penimbangtara. Rujukan tersebut hendaklah dibuat oleh seorang yang independan; iaitu penimbangtara. Tambahan pula, sebagai satu pihak yang mempunyai kepentingan tidak menjaminkan bahawa plaintif akan hanya merujuk kepada persoalan undang-undang yang dibenarkan oleh penimbangtara, sebagaimana yang berlaku di dalam perkara ini. Di sini, defendan telah mengadu bahawa plaintif telah merujuk persoalan undang-undang tambahan yang tidak ditimbulkan di hadapan penimbangtara. Aduan tersebut adalah sah. Perkara yang tidak ditimbulkan di hadapan penimbangtara, pihak tersebut tidak layak untuk menimbulkannya di hadapan mahkamah (lihat ms 634A–B).

(3) Adalah kewajipan penimbangtara untuk meneliti kes, mengenalpasti fakta-fakta dan kemudian membentuk persoalan undang-undang yang akan dirujuk kepada mahkamah. Ia bukanlah kewajipan atau fungsi mahkamah ini untuk meneliti rekod-rekod dan dokumen-dokumen kes ini yang panjang lebar untuk menentukan fakta-fakta dan undang-undang yang patut diputuskan. Mahkamah ini tidak boleh merampas peranan dan fungsi seorang penimbangtara (lihat ms 635B).

(4) Seorang penimbangtara dilantik untuk memutuskan persoalan-persoalan keuda-dua fakta-fakta dan undang-undang. Adalah satu prinsip yang mapan bahawa bukan semua persoalan undang-undang hendaklah dirujuk kepada mahkamah untuk keputusan. Satu pertikaian hendaklah didengar oleh sebuah mahkamah hanya jika undang-undang terlibat adalah penting dan kompleks dan bukan hanya atas alasan bahawa ia boleh kembali ke Mahkamah Tinggi melalui kes yang dinyatakan (lihat ms 635D).]

Notes

For a case on arbitrator generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 892–916.

Cases referred to

Halfdan Grieg & Co v Sterling Coal & Navigation Corporation & Anor [1973] 2 All ER 1073 (refd)

RS Hartley Ltd v Provincial Insurance Company Ltd [1957] 1 Lloyd's Rep 12 (refd)
Sinason – Teicher Inter–American Grain Corp v Oilcakes and Oilseeds Trading Co Ltd [1954] 2 All ER 497 (refd)
Yee Hoong Loong Corp Sdn Bhd v Kowng Fook Seng Co [1993] 1 MLJ 163 (refd)
Yip Chee Seng & Sons Sdn Bhd v Ornaconstruction Corp Sdn Bhd [1998] 7 MLJ 655 (refd)

Legislation referred to

Arbitration Act 1952 ss 22, 23
Rules of the High Court 1980 O 69

Mohamad Bazain Hj Idris (*Junaidah bte Mohd Isa* with him) (Federal Counsel, Jabatan Peguam Negara) for the plaintiff.

Kho Sze Chee (*Ting Yong Ginn* with her) (*CY Chua & Co*) for the defendant.

Zakaria Sam JC: **.** By way of originating summons the plaintiff filed this application under ss 22 and 23 of the Arbitration Act 1952 ('the Act'), inter alia, for the following orders, that:

i) This court determines the question of law as stated by the plaintiff:
ii) To stay the filing of points of defence and counter claim, further and better particulars, discovery and inspection of documents and all related matters contained in the arbitrator's fourth order for directions until the final determination of the case stated by this court;
iii) The costs of the application is to be borne by the defendant.

At the outset of the hearing of this application the defendant raised two preliminary objections to the plaintiff's application, ie:

i) That the plaintiff's application failed to comply with the requirement of O 69 of the Rules of the High Court 1980 ('the RHC') and/or;
ii) That the plaintiff's application failed to comply with the requirements of ss 22 and 23 of the Act.

The submissions

The learned counsel for defendant submitted that under O 69 r 3(2) of the RHC, it is mandatory that the arbitrator be served with this originating summons. He argued that the arbitrator must be made a party to this originating summons, otherwise, this court would not be able to apply s 22 of the Act as there is no party that this court can order to state a case in the event that there should be such a necessity.

He further submitted that under O 69 r 2(2) and r 3(2) of the RHC and s 22 of the Act, the arbitrator may or shall, if directed by the High Court to state any question of law as a special case for the decision of the High Court.

There is no provision in the RHC or the Act for the plaintiff to state the special case for the decision of the court.

In reply, the learned counsel for plaintiff submitted that they had made an application to the arbitrator for a reference on a case stated to the High Court. Instead of stating the facts on the question of law posed by the plaintiff on the issue of limitation, the arbitrator had granted leave to the plaintiff to file the case stated on the question of law to the High Court. The arbitrator further directed that the defendant could reserve the right to reply to the facts submitted by the plaintiff at the High Court. In light of the said direction, the plaintiff took out this originating summons.

The law

For ease of reference, produced below are the relevant provisions of s 22 of the Act and O 69 of the RHC:

> Section 22 of the Arbitration Act 1952
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> Section 22(1)An arbitrator or umpire may, and shall if so directed by the High Court, state:
>
> (a) any question of law arising in the course of the reference; or
>
> (b) an award of any part of an award in the form of a special case for the decision of the High Court.
>
> (2) A special case with respect to an interim award or with respect to a question of law arising in the course of a reference may be stated or may be directed by the High Court to be stated, notwithstanding that proceedings under the reference are still pending.
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> Order 69 r 3(2) of Rules of the High Court 1980:
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> An application for an order under s 22 of the Act directing an arbitrator or umpire to state a case must be made by originating summons and the summons must be served on the arbitrator or umpire and the other party to the reference.

Findings of the court

Having read s 22(1) of the Act, I am of the opinion that reference of question of law to the High Court could only be done in three ways:

i) by the arbitrator on its own volition; or

ii) by the arbitrator on the application of any party where the arbitrator may or may not entertain such request; or

iii) if the arbitrator decides not to allow such application, any party may apply to the High Court by way of originating summons under O 69 r 3(2) of the RHC to get a court order to direct the arbitrator to state the question of law in the form of a special case for the decision of the High Court which order the arbitrator must comply.

It is clear, therefore, that the plaintiff themselves have no legal right to refer any question of law for the decision of the High Court. Only the arbitrator has the right to do so and that this right could not be delegated to any of the

parties to the dispute. Any such delegation of function is, therefore, contrary to the provisions of s 22 of the Act. A

It is also not proper for the plaintiff, being an interested party in this matter, to refer the question of law themselves on behalf of the arbitrator. The reference should be made by an independent person ie the arbitrator. Furthermore, being an interested party there is no guarantee that the B plaintiff would only refer the question of law allowed by the arbitrator, as happened in this matter. Here, the defendant complained that the plaintiff had referred additional questions of law which were never raised before the arbitrator. The complaint is valid. A point not raised before the arbitrator, the party is not entitled to raise it before the court (see *Sinason – Teicher Inter–American Grain Corp v Oilcakes and Oilseeds Trading Co Ltd* [1954] C 2 All ER 497).

The senior federal counsel for the plaintiff submitted that the act of the arbitrator granting leave to the plaintiff to file the reference was not devoid of legal grounds as this is provided for by para 1(d) of The Institute of Engineers Malaysia Rules for Arbitration (of which both parties agreed to D adopt) which reads:

> Subject to these Rules the Arbitrator may give such direction as the Arbitrator may think fit, at any time after his appointment for the conduct of the arbitration having regard to the circumstances of the case and with a view to ordering a fair, orderly, expeditious, and economic resolution of the dispute. E

This rule clearly empowers an arbitrator to give any direction as he deems fit for a fair, orderly, expeditious and economic resolution of any dispute. But in exercising his discretion here, an arbitrator must ensure that his act or directive is not in conflict with the provisions of s 22 of the Act. It is very clear then, his act of granting leave to the plaintiff to refer the matter in F question to court is not within the ambit of this rule since it is in conflict with the provisions of s 22 of the Act.

Why did not the arbitrator take upon himself to refer the question of law to the High Court?

His explanation could be found in para 7 of his fourth order for G Directions (2008/4) dated 24 August 2000 which reads:

> My reason for granting leave to the respondent (the plaintiff here) in para 7 above was that the limitation to the High Court themselves well before the commencement of this arbitration. The point of law raised by the Respondent's counsel was a fundamental issue, which should have been H resolved by the High Court before the parties proceeded to arbitration.

There is no justification in his reasonings. The parties here had chosen to go before the arbitrator. Once they did that, s 22 of this Act comes into play and the arbitrator has no other option but to act strictly according to requirement of that section. I

It was held by Augustine Paul JC (as he was then) in *Yip Chee Seng & Sons Sdn Bhd v Ornaconstruction Corp Sdn Bhd* [1998] 7 MLJ 655 that:

> The court will have in mind the fact that as the parties have agreed to resolve any dispute by arbitration it must be slow in taking over the hearing of the dispute merely because it involves a point of law. After all the point of law can be determined by way of case stated if the need arises. That is the precise function of s 22 of the Act.

It is the duty of the arbitrator to sift through the case, identify the facts and then frame the question of law that is to be referred to court. It is not the duty or function of this court to go through the voluminous records and documents of the case to determine the facts and the law that is to be decided. This Court could not usurp the role and function of an arbitrator.

In this regard Lord Goddard CJ, in *RS Hartley Ltd v Provincial Insurance Company Ltd* [1957] 1 Lloyd's Rpt 121 had this to say:

> I do not know what facts the arbitrator found or what the facts of the case are. I do not think I am entitled to look at the affidavits because it is for the arbitrator to find the facts and not for the court to do so. The court has no right to find the facts unless the arbitrator or the parties state a case. But the parties have gone to arbitrator, and it's the arbitrator to find the facts.

An arbitrator is appointed to decide on issues both of facts and law. It is a well settled principle that not all questions of law should be referred to court for decision. A dispute should be heard by a court only if the point of law involved is substantial and complex and not merely on the ground that it may come back to the High Court by way of case stated.

It was held by the Court of Appeal in *Halfdan Grieg & Co v Sterling Coal & Navigation Corporation & Anor* [1973] 2 All ER 1073 that:

> When one party asks an arbitrator or umpire to state his award in the form of a special case, it is a matter for his discretion. If the issues are on matters of fact and not of law, he should refuse to state a case. If they raise a point of law, it depends on what the point of law is. He should agree to state a case whenever the facts, as proved or admitted before him, give rise to a point of law which fulfils these requisites. The point of law should be real and substantial and such as to be open to serious argument and appropriate for decision by a Court of law (see *Re Nuttall and Lynton and Barnstaple Railway Co*) as distinct from a point which is dependent on the special expertise of the arbitrator or umpire (see *Orion Compagnia Espanola de Seguros v Belfort Maatschappij voor Algemene Verzekgringeen*). The point of law should be clear cut and capable of being accurately stated as a point of law — as distinct from the dressing up of a matter of fact as if it were a point of law. The point of law should be of such importance that the resolution of it is necessary for the proper determination of the case — as distinct from a side issue of little importance.

This principle in *Halfdan Grieg*'s case was applied and followed by our Court in *Yee Hoong Loong Corp Sdn Bhd v Kwong Fook Seng Co* [1993] 1 MLJ 163.

As a point of observation on the qualities, functions and duties of an arbitrator, I wish to refer to the comment of Mustill & Boyd in their book, *The Law and Practice of Commercial Arbitration in England*, (2nd Ed), at p 477 which reads:

The parties must be taken to have foreseen, which they agreed to have their disputes resolved by arbitration, that the disputes might involve question of law as well as of facts; and a skilled arbitrator might be just as successful in resolving a dispute involving both types of issues as a judge of the High Court. Therefore it is advisable for parties to choose the arbitrator with legal qualification if they had forseen their disputes involved a difficult question of law.

Conclusion

For the above reasons, I allow the objections by the defendant. The originating summons is hereby dismissed.

Since the reference was filed upon the direction of the arbitrator (which is done against the spirit of s 22 of the Act), the plaintiff should not be penalized in term of costs. Therefore each party is to bear their own costs.

Originating summons dismissed.

Reported by Wong Ee Lynn